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# The development of international policy in relation to victims of crime

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## Abstract

This article addresses the development of international policy in relation to victims of crime. It starts with an outline of the 1985 United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It demonstrates that compliance by Member States with the provisions of the Declaration is still unsatisfactory, despite serious efforts by the UN to promote its standards and norms. A similar trend is described on a regional level in Europe. In 2001, the European Union adopted a Framework Decision (a legally binding instrument) on minimum rights for crime victims in the criminal justice system. Evaluations undertaken in 2004 and 2009 have proved that none of the Member States fully complied with its content. In the article it is argued that a lack of compliance is usually followed by the adoption of an even stronger legal instrument, containing even more ambitious rights for victims of crime. It is questioned whether this is the most productive approach. It is doubted that 'hard law' is always more effective than 'soft law'. The most recent generation of more elevated rights run the risk of leading to 'victim fatigue' on the part of the officials responsible for the operation of the criminal justice system.

## Keywords

International victims' policy, United Nations Declaration, rights for victims of crime

## Introduction

Those were the days. During the early 1980s some pioneers in victimology and victim advocacy took the initiative to get the United Nations (UN) involved in crime victims' issues. What followed was a remarkable success story. The victim advocates conducted a well-orchestrated and executed campaign and were able to convince national policy makers and legislators that it was time for change. They aimed primarily at reform of the criminal justice system on behalf of victims of

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crime. Within a remarkably limited number of years they had gained massive support for their ideas to enable the General Assembly of the UN to adopt – unanimously – the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>1</sup>

Of course, the UN Declaration reflected the spirit of the time. It is no coincidence that during the same year, 1985, the Council of Europe – a supranational organization primarily established to promote human rights – adopted Recommendation no. R(85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure.<sup>2</sup> The content of both international protocols shows considerable overlap. This is not the appropriate place for an extensive account of the political and social conditions that were conducive to these legal novelties. Suffice it to say that the so-called women's movement played an important role; some particularly invasive terrorist attacks inspired some countries to take steps in the direction of protecting victims; and a general trend of more individualism in society – with citizens insisting on more personal rights – contributed to government officials being more receptive to the newly proposed reforms. With hindsight one could even maintain that the phenomenon of globalization-avant-la-lettre was a perfect match for the new vision of what the legal position of crime victims should look like (Letschert and van Dijk, 2011).

On one hand the UN Declaration was an immensely important breakthrough, while on the other it was only one of the first examples of international rule making in our area of concern. The UN Declaration is often referred to as the Magna Carta of victims' rights. This supreme expression of acclaim is justified in a number of ways. Firstly, the Declaration served as an example for different regional political entities to emulate this approach. Subsequently, some domestic legislators changed their system, directly appealing to the standards set by the Declaration.<sup>3</sup> In a way, that was only a start. Later on, UN initiatives were taken with an eye to particularly vulnerable categories of victims. This led to a debate whether – or in what situations – stronger legal instruments were needed, such as a Convention. In other areas it was not specific groups of victims that were targeted, but specific topics were addressed. State compensation is a case in point. During the same period of time more attention was paid to instances of mass victimization, often resulting from armed conflicts between countries or from violent internal struggles within national boundaries. The most prominent examples of responses to this kind of suffering were the establishment of International ad hoc Criminal Tribunals (ICTY and ICTR)<sup>4</sup> and later on the International Criminal Court (ICC).

These developments led to a series of new questions, which can only be examined by academic research in the area of victimology. Quickly it became clear that proclaiming international standards governing the position of victims in criminal law and procedure does not automatically change the reality of the situation of the people involved. The issue of compliance was raised. Under what conditions can international protocols be effective? Does the status of the legal instrument make a real difference? Is so-called 'hard law' by definition more beneficial for crime victims than 'soft law'? Why have many nation States so readily agreed to new demands by the international community, when it is obvious from the start that they will not be able to fully comply with them? How is it feasible to deal with the right to participation and the right to compensation in situations where thousands of people have been victimized? And what should the future role of traditional criminal justice systems be in this respect? Are new (or revised ancient) practices such as mediation and restorative justice to be preferred as a new and alternative paradigm of administering criminal justice?

These are the questions that will be addressed in the present contribution. It goes without saying that not every item can be dealt with in depth. That would require a new handbook in victimology. Yet it appears that it is possible to briefly touch on these topics in a useful, systematic way. The main purpose of the present contribution is to make clear that we – the victimological community –

have moved beyond the stage of victim advocacy. Our recommendations are more research driven than a couple of decades ago (Schneider, 2001). Yet we still have a long way to go. The present article aims to present some conclusive evidence supporting these academic claims.

## The 1985 United Nations Declaration and its aftermath

In the opening paragraph it was flatly asserted that it took relatively little effort to get the UN Declaration adopted. This statement has to be slightly amended. There was one issue that divided some Member States, or rather, some groups of countries. The developed world wanted the scope of the Declaration to be restricted to crime victims proper. By contrast, many representatives of the developing countries favoured including victims of abuse of power (a particularly pressing problem in the 'third world') and awarding them the same rights as crime victims. In the end the dispute was resolved by dealing with both types of victims, but giving the crime victims substantially more and more specific rights than the victims of abuse of power.

One cannot capture the nature of the Declaration without recounting the basic rights (framed as 'principles') designed for victims of crime. According to the UN, they shall have the right to:

- be treated with respect and recognition;
- receive information;
- allow their views to be presented and considered;
- proper assistance throughout the legal process;
- protection of privacy and physical safety;<sup>5</sup>
- informal dispute resolution (including mediation);
- social assistance;
- state compensation.<sup>6</sup>

The rights of victims of abuse of power are much harder to summarize in some catchphrases. The reason is that these entitlements are more limited in number (art. 19–21) and much more vague in terminology. Following art. 19 States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses.<sup>7</sup> Art. 20 is even more of a mushy, 'feel good' provision, stipulating that states should consider negotiating multi-lateral international agreements in this area. Art. 21 is – more or less – a restatement of the weak art. 19: States should periodically review existing legislation and practices and should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power.

It is obvious that the UN Declaration – when we compare the two separate chapters – reflects the power relations of those days. If we look at the part on crime victims,<sup>8</sup> there can be no doubt that the document was visionary and clearly aspirational. As such it has inspired future generations of lawmakers and policy makers (van Dijk, 2005).<sup>9</sup>

Making law is easy: making it work can be extremely difficult. This is particularly relevant when we discuss reform of the criminal justice systems on behalf of victims of crime. There are two obvious reasons for this.<sup>10</sup> One is that the scale of this kind of reform is huge. If the international community were to decide that it wants new and uniform provisions on fighting counterfeiting of currency, it is relatively easy to comply with such requirements. It only requires changing one or two sections in the national Criminal Code. But when the same international community determines that the victim 'is the forgotten party in the criminal justice system', much more is

at stake. The entire system needs to be adapted. All of the traditional routines should all of a sudden be considered obsolete. That is asking a lot from every state party involved. Secondly and on top of that, the conventional system as it existed until that moment had been based on some core values, values that have deep culturally determined roots. Probably two of the main core values can be singled out as being of crucial importance. One of these is that law enforcement officials have always seen it as their main job to catch criminals. If one all of a sudden starts issuing demands to them to be 'nice' to victims as well, that is tantamount to asking them to change their world view. Similarly, the judiciary have always regarded it as their main job to see to it that every defendant receives a fair trial. This has been their most sacred imperative since the first days of their legal training. It has become second nature to every individual judge. Given the fact that lawyers are usually only appointed to the bench after many, many years of solid service within the system, it should not be surprising that they have utterly internalized the core values of their profession. If and when they would perceive a more prominent role of the victim during criminal proceedings as a potential threat to the defendant's right to a fair trial, it is obvious that there will be massive reluctance (to say the least) to be genuinely supportive of such a kind of reform.

The UN officials were not entirely oblivious to these kinds of legal roadblocks. They did not take it for granted that adopting the Declaration would instantly change the world. They took concrete steps to facilitate the effectiveness of the provisions contained in the Declaration. In 1989, a 'plan of action' was issued by the General Assembly and an Ecosoc Resolution (1989/57) was adopted with the aim of not only exhorting Member States to act decisively, but also to inform them what steps would contribute to that goal. A few years later, in 1994,<sup>11</sup> a questionnaire was disseminated calling upon the members of the UN to provide progress reports. The ensuing result was downright disappointing. There was a record low return rate (less than 25% of the Member States responded at all) and those who did (presumably the frontrunners in this field) could not convince the UN Secretariat that their performance was fully satisfactory.<sup>12</sup> As a next step, in 1997 the UN produced two new documents furthering its aims. One was the 'Manual on the use and application of the Declaration'; the second one was the 'Guide for policy makers'.<sup>13</sup> Both dealt – although in a different way – with topics familiar to all experts in the fields of victimology and victim assistance. They explained how to sensitize national governments' officials; they emphasized the need for training of all agencies with staff in direct contact with victims; and they specified procedures on how to set up service-providing organizations. This was all done with great care and supported by state-of-the-art academic knowledge and practical experience. Nevertheless, the efforts were largely in vain. A few years later the conclusion was still inescapable that implementation of the UN Declaration could only be described as unsatisfactory.<sup>14</sup> Sadly, this conclusion applied to the developing world as much as the more affluent countries.

This left the world community with the question what to do next. Since all else had failed so far (to a major extent), some actors felt the best way to proceed was to aim for a stronger legal instrument: a UN Convention on victims' rights. It was suggested, *inter alia*, that a Convention would increase visibility of victims' issues; that 'hard law' would put more pressure on governments and would be taken more seriously by courts (Garkawe, 2009). Others cautioned that aiming for a Convention would lead to watered down provisions (compromise solutions) and that it would take too long to negotiate such a document (van Genugten et al., 2006).

In order to persuade the UN of the importance of negotiating a Convention, in 2005 a group of academic experts produced a Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power.<sup>15</sup> It was intended to demonstrate that a Convention could – substance wise – be richer than the Declaration, since it could incorporate the latest insights gained from victimological

research. Examples pertain to, amongst others, particularly vulnerable victims;<sup>16</sup> protection from 'repeat victimization';<sup>17</sup> the right to have the decision not to prosecute reviewed by a court; the right to have the government enforce any judicial order granting financial awards; the rights to receive information;<sup>18</sup> extension of the rights to victim support and restorative justice practices; and, finally and most importantly, a better system of monitoring compliance.<sup>19</sup>

Is it likely that the UN will adopt a Convention like this in the next couple of years? The simple answer is: no, it is not. The opening sentence of the present contribution read: 'those were the days'. Well, the times have changed. The days have gone when a small group of knowledgeable and dedicated experts could persuade the UN to do what is best for crime victims. Nowadays, there is much talk of 'convention fatigue'. More specifically, the minutes of the annual meeting of the UN Commission on Crime Prevention and Criminal Justice make it clear that since 2006 interest in this project has actually *declined*. At the 15th Session of the Commission in 2006 it was decided that there would be an intergovernmental expert group meeting (IEGM) reviewing the position of crime victims, charged with, inter alia, analysing ways and means to promote the use and application of UN standards and norms in this area. The IEGM was convened and its report did include a reference to the Draft Convention just outlined. From the 16th Session in 2007 onwards, any reference to a potential Convention was omitted in the official records. During the 12th UN Crime Congress in 2010 in Salvador, Brazil, victims' issues were not part of the overall theme of the Congress, nor of the agenda items or the workshop topics. For UN watchers, that says it all. Does that mean the process of contemplating a convention has been pointless? No. The mere existence of a draft UN Convention has opened the way for new debates on the best possible range of victims' rights and policy measures on a global level. That is progress in itself.

## A regional example: law and policy on the level of the European Union

In many ways the European Union (EU; as it is now named) displays a story that is quite different from the one exhibited by the UN. Unsurprisingly, there are also a number of significant similarities.

During the mid-1980s the EU was not yet in any shape or form a political entity. It was an international organization aimed at economic cooperation.<sup>20</sup> As such, the EU refused any kind of competence dealing with criminal law and criminal procedure. In 1992, with the adoption of the Treaty of Maastricht, the EU came into being.<sup>21</sup> In the Treaty of Maastricht, a so-called Third Pillar was established, relating to cooperation between the Member States in the area of justice and home affairs. Later this was relabelled to an 'area of freedom, security and justice'.<sup>22</sup> This allowed the EU to enact 'Framework Decisions' affecting the criminal justice systems of its members. It is important to stress that Framework Decisions are binding legal instruments. They oblige the Member States to adapt their domestic legislation to the EU standards (a process that is referred to as 'transposal').

In 2001, the EU adopted the 'Council Framework Decision on the Standing of Victims in Criminal Proceedings'.<sup>23</sup> The main objective of this new instrument was given in Recital no. (8):

The rules and practices as regards the main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed.

This wording not only states the main goal, but it also reflects the international environment for which this new policy was drafted: language problems are highlighted, partly to protect a fair internal economic market and as a consequence of the frequent occurrence of cross-border crime.

Apart from the international dimension, the provisions in the Framework Decision are to a large extent similar to the ones in the UN Declaration. Some deviations that can be considered to be improvements concern the number of times victims are questioned by the authorities;<sup>24</sup> more advanced informational rights;<sup>25</sup> reimbursement of expenses incurred when the victim has to play a role in court; and – interestingly – the construction of court facilities.<sup>26</sup>

As was the case with the UN Declaration, the main question was how the Member States would comply with these new obligations. Remember: a Framework Decision is – unlike a UN Declaration or a Council of Europe Recommendation – *a legally binding instrument*. As a monitoring mechanism the EU relied on self-reporting of any progress made (article 18). This did not work (Groenhuijsen and Pemberton, 2009). At the required date, *none* (yes: none!) of the members had submitted the required report to the European Commission in Brussels. After some stiff reminders about their duties, in the end only 10 States ‘had sent relatively complete contributions on transposal’.<sup>27</sup> The verdict of the Commission was devastatingly critical. It concluded in a 2004 report that *none* of the Member States had fully complied with its obligations. As the most dramatic example of failure the Commission observed that not even a single member complied with probably the most basic and important provision in the Framework Decision, namely article 2, reading:

Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognize the rights and legitimate interests of victims with particular reference to criminal proceedings.

Five years later the Commission issued the next assessment report.<sup>28</sup> This time 13 Member States out of 27 ‘had sent relatively complete contributions’. It would not be useful to give an impression of the long list of shortcomings that are still reported. Instead, it suffices to quote the main conclusion: ‘The implementation of the Framework Decision is not satisfactory. The national legislation sent to the Commission contains numerous omissions. Moreover, it largely reflects existing practice prior to the adoption of the Framework Decision.’

This is a very interesting conclusion. Nothing much has changed compared to existing practice before 2001. How is this possible? Did nobody care about new EU legislation? The obvious explanation is that back then the Member States were convinced they already complied with the main requirements of the Framework Decision. There is compelling evidence that the national representatives who negotiated this instrument were instructed not to accept additional obligations that went beyond current legislation.<sup>29</sup> They did not want change and believed there was no need for change.

The European Commission made a different analysis. According to a Commission Staff Working Paper, the ineffectiveness of this legislation was due to three factors.<sup>30</sup> Firstly, the Framework Decision suffers from ambiguous drafting. This has made it difficult for Member States to know how best to implement legislation or has left them such wide discretion in implementation that no action has resulted.<sup>31</sup> Secondly, it is claimed that a number of articles in the Framework Decision do not impose concrete obligations. In effect, Member States could carry out no action and remain in compliance with the Decision.<sup>32</sup> Finally, the Framework Decision does not afford the Commission or individuals to bring infringement proceedings against Member States, which further reduces compliance.<sup>33</sup>



Perhaps what matters most is that the Commission apparently had an unshakable belief in the force and effectiveness of formal (EU) legislation.<sup>34</sup> They implicitly adhered to the ‘command theory’ of law.<sup>35</sup> When the Framework Decision did not work, they resorted to an even stronger legal instrument: a Directive.<sup>36</sup> Instead of literally copying the provisions of the Framework Decision in the new Directive – which would have made sense, given the deplorable state of transposal of the existing provisions – the Commission embarked on an even more ambitious adventure, by including more demanding standards in the Directive.<sup>37</sup> The new rights include the right to an individual assessment, facilitation of referrals from the police to victim support services, the right to review a decision not to prosecute, and the right to be protected from secondary and repeat victimization, intimidation and retaliation during all stages of police investigation and criminal justice proceedings. Some of these innovations clearly make sense. However, others are just overambitious. Just to give an idea of the implications of these provisions, article 22 can be quoted in full:

Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, (...) <sup>38</sup> due to their particular vulnerability to secondary and repeat victimization, to intimidation and to retaliation.

It cannot be denied that this provision is very sympathetic and extremely advanced. It is also rooted in sound victimological theory, which reveals the variety in victims’ needs (Shapland and Hall, 2007). The problem is, though, that this is not practical. It is not feasible. There is no way it can work. Anyone familiar with risk assessment models knows that it is impossible to detect all the symptoms mentioned in article 22 with a simple test that can be administered at the time of reporting a crime. This inevitably leads to a more fundamental problem. If one requires the law enforcement bodies to perform additional and time-consuming assessments of victims – which might delay ordinary administrative procedures – it might very well adversely affect the core attitude of police officers towards victims’ rights in general. This general point will be further elaborated below.

## State compensation

As a matter of fact, the 1985 UN Declaration was fairly advanced on the topic of State compensation.<sup>39</sup> Even though carefully worded – which is quite understandable given the global scope of application – the basic principles were articulated quite clearly. Article 12 reads:

When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to: (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

And article 13: ‘The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged.’ The idea behind these provisions constitutes an important step in the development of international policy in relation to victims of crime. It calls for social solidarity with crime victims. It sends the message that even though the state is not legally liable for damages incurred by serious intentional crime, it cannot simply avert its gaze from the impacts

on the victims. State compensation can be regarded as a measure of civilization – for those states that can afford it.

In subsequent years, quite a few international protocols have been adopted supporting the general idea of state compensation. There is no additional value in listing all of these. It is, however, interesting to notice that the European Framework Decision of 2001 completely ignored this topic. The reason is, as was hinted at in the previous section, that states did not want to assume additional burdens over and above those already present in their national systems. In 2004, the EU adopted a noticeable Directive that was aimed at targeting a special complication to state compensation.<sup>40</sup> The Directive set up a system of cooperation to facilitate access to compensation to victims of crime in cross-border situations. This system should ensure that crime victims could always turn to an authority in their Member State of residence and should ease any practical and linguistic difficulties that occur in a cross-border situation.<sup>41</sup> This constitutes an important policy measure for victims who are subjected to crime in a country other than their own. The mechanism used is to set up a ‘deciding authority’ in the country where the crime was committed (and who is responsible for paying compensation) and an ‘assisting authority’ in the country of residence of the victim. As the designation suggests, the ‘assisting authority’ is there to help the victim. The victim can apply for compensation in his home country and in his native language. The assisting authority will then process the application and deal with any administrative complexities. This simple but clever system was evaluated in 2009.<sup>42</sup> On the surface, the results look brighter than in the case of the Framework Decision. According to the report, national compensation schemes provide fair and appropriate compensation; in this regard ‘there seems to be a substantial degree of compliance across Member States’. However, when it comes to the specifics of cross-border crime – the use of standard forms, languages and the use of communications technology – claimants are much less positive about the process than the national authorities (read: deciding and assisting authorities). The Commission gives a number of recommendations to improve the situation. Countries are encouraged to seek to collect data on the application of the Directive.<sup>43</sup> States should ensure that citizens are better informed about the Directive and about national compensation schemes (‘clarity and transparency concerning key elements of national compensation schemes is important’). Finally, States should ensure that language requirements of the Directive are respected.

Independent research by victimologists leads to a number of additional conclusions regarding state compensation.<sup>44</sup> Each year, approximately one billion people fall victim to crime. A large proportion of them are hit by violent crime and suffer from major adverse effects, physically, psychologically and economically. Only very few of them will ever receive reparation from the offender or state compensation.<sup>45</sup> This is simply caused by the sobering reason that, despite all existing solemn policy rules (with many qualifying clauses), on a global level most countries just do not have a national compensation scheme. In the countries that do have a national State compensation scheme, it has been demonstrated repeatedly that victims are unaware of their existence or are not able to access them. With the exception of a handful of countries, the standard is that only a small minority of those eligible for compensation will actually receive it. Another problem connected with the lack of dissemination of information on this topic is that in many countries over 50% of the applications are rejected (Miers, 2007; Strang, 2002). One can imagine the significant implications of this statistical finding. Few factors contribute to secondary victimization more than raising expectations with victims and then disappointing them by not living up to these expectations. The next problem that surfaced in quite a few countries is speed. Quite often the process of filing a claim until the final decision just takes too long (it can take years!). Here the old dictum applies: justice delayed is justice denied. Fortunately, there is some good news too. Research shows

consistently that if compensation is awarded in a timely way, victims are not overly concerned about the amount of money they receive (Braithwaite, 1999 (with a recurring emphasis on symbolic aspects of compensation); Strang, 2002).

## Special categories of victims

Article 17 of the 1985 UN Convention holds that in providing services and assistance to victims, attention should be given to those who have special needs. In the development of international policy making in relation to victims, we have come a long way since then.

It is not an overstatement to assert that during the past decades we have moved in the direction of a 'differential victimology'. This means that we have come to recognize that victims are not a homogeneous group but are individual people in very diverse circumstances who can have substantially different needs in the aftermath of crime (Laxminarayan, 2012). Research on this topic started with designing typologies of victims (see, amongst others, Fattah, 1991). The same idea, however, has increasingly permeated new policy documents and other international legal instruments. Perhaps the pinnacle of this novel approach is represented by the 2012 EU Directive, which goes a long way to explaining the different kinds of victims who would, during the previous years, all have been ranked under the umbrella concept of 'particularly vulnerable victims'. The Directive distinguishes special needs arising from the personal characteristics of the victim,<sup>46</sup> from the type or nature of the crime, or from the circumstances of the crime. Then the Directive moves on to enumerate a large number of crimes where special care and assistance might be called for:

... particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender makes them particularly vulnerable. In this regard, victims of terrorism, organized crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

On top of that child victims are by definition presumed to have specific protection needs.<sup>47</sup> It can be argued that this is one of the few areas being reformed on behalf of victims where international policy standards by and large precede and guide national legislators. Few countries now have provisions in their Codes of Criminal Procedure (or similar Acts) protecting these categories of victims in a systematically different way. By comparison, many international protocols in our field provide for measures that had already been incorporated in many – or even most – domestic jurisdictions.

If we take this argument one step further, it is useful to examine a number of dedicated international instruments. In the second section it was concluded that the adoption of a UN Convention on victims' rights is very unlikely to happen in the near future. In that context the phrase 'convention fatigue' was used. Now, this 'fatigue' apparently only concerns the general population of crime victims. On the level of the UN this is evidenced, *inter alia*, by the adoption of the UN Convention Against Transnational Organized Crime<sup>48</sup> and the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime.<sup>49</sup> Reference can also be made to the Rome Statute (1998);<sup>50</sup> to the Convention on the Rights of the Child,<sup>51</sup> followed by the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; and the Basic Principles and

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>52</sup>

The same phenomenon can be discerned on a regional level. Here again we increasingly see new instruments being developed to provide for specific policy measures aimed to protect the interests of a number of the particularly vulnerable victims. Suffice it to mention the Council of Europe Convention on Action against Trafficking in Human Beings<sup>53</sup> and the Council of Europe Convention on preventing and combating violence against women and domestic violence.<sup>54</sup>

This part of the development of international policy in relation to victims of crime will probably be continued for some time to come. There is no doubt that it is quite convincing to deal with victims in a way that best corresponds with their individual needs. Perhaps the only obvious danger involved here is that some categories of victims receive 'preferential' treatment without there being a solid justification.<sup>55</sup> If that were to occur, it would violate the basic principle prohibiting discrimination of any kind (Best, 1999).

## International Criminal Court and mass victimization

Among legal scholars and experts in international relations there is a growing interest in the concept of 'global law'.<sup>56</sup> Global law conceives of systems of regulation that are geared to serve the interests of a globalized society in any place on this globe. It is important to note that global law is more than a product of comparative law. It is a genuinely new idea of how adjudication of conflicts can take place. As such, the notion of global law should be particularly appealing to policy makers who want to serve the best interests of crime victims at an international level.

These preliminaries are here regarded as the contextualization of how the world community could deal with mass atrocities, with mass victimization taking place in war and in warlike situations. To this end in 1998 the Rome Statute was concluded, establishing the ICC.<sup>57</sup> It is well known that the jurisdiction of the ICC extends to the familiar trio of genocide, war crimes and crimes against humanity.

Looking at the procedural shape of the ICC, it looks like a perfect blend of the different 'families of law' prevalent among the various regions and countries of the world.<sup>58</sup> It has distinct elements of adversarial systems, but it leaves equal (or at least substantive) room for civil law systems. The international policy makers thus have apparently succeeded in designing a system of adjudicating the most complex and severe criminal cases in a way that benefits all the parties involved. The defendants are assured of a fair trial, and the victims are given a fair deal. For the first time in history, victims have been awarded real procedural rights in international criminal justice.<sup>59</sup> The rules provide for the right to participation, the right to representation and the right to protection (Wemmers and de Brouwer, 2011). In order to actually safeguard these rights, no less than three different units were attached to the ICC specifically charged with tending to victims' interests (Garkawe, 2001, 2003). So, in short, the *model* of the ICC looks virtually perfect. But how about *the operation of the model*? (Groenhuijsen, 2009). That is a much more complicated question. Since the ICC is just about starting to actually try cases, we have to rely to a large extent on experience with the other international tribunals in order to address this question. One thing is clear from the outset: the large numbers of victims involved will have a major impact on all the structural arrangements and provisions surrounding the ICC. To start with, unlike in national jurisdictions, victims will not be acknowledged as such automatically by reporting a crime against them. In order to be recognized as a victim with standing, they need to apply for that status. This turns out to be a cumbersome process. Connected to this is the practicality of the provisions on participation. It is

inconceivable to have hundreds or even thousands of genuine victims physically participating in the trial in The Hague. The only way to tackle this problem is to have large groups of victims represented by a single person – if need be, on a mandatory basis.<sup>60</sup> On top of that, experience with the ad hoc Tribunals has proved how difficult it is to protect victims (and their families) who have given evidence in The Hague. Finally, the issue of reparation assumes a very distinct dimension when it does not pertain to a single individual, but instead to many thousands of victims. A solution for this problem has been found by expanding the content of the concept of reparation according to the Van Boven–Bassiouni principles, which also allows for symbolic and collective forms of reparation.

All in all, it looks like the model cannot be operated without encountering or even provoking some serious frictions. These tensions inevitably affect professionals who actually run the system and it has also attracted the attention of academics. It is virtually a public secret that many members of the prosecutor's staff and quite a few judges in the international court and tribunals have grave concerns about the active involvement of victims in their trials. In academia, many scholars are increasingly critical of the provisions on victims in the Rome Statute and RPE.<sup>61</sup> This is a reality we just have to deal with.

To underscore this point, a reference to national criminal justice might be helpful. International protocols on victims' rights do not make an exception for cases in which there are very large numbers of victims. Obvious examples are instances of cybercrime (Prins, 2011), environmental crime (Verschuuren and Kuchta, 2011) and certain manifestations of financial crime. It is indisputable that regular trials are not equipped to deal with these kinds of mass victimization. So, again, this leads to discomfort on the side of authorities with victims' rights, sometimes even bordering on rejection. The result is that the rights of victims are simply bypassed. Their claims are declared inadmissible by the courts, even when there is no statutory basis to do so.

## Current topical issues and concluding remarks

The development of international policy in relation to victims of crime is too broad a topic for one single article. Hence, choices have to be made as to what to include and what to leave out. The logical starting point was the 1985 UN Declaration and subsequent comparable documents on a regional level. State compensation is important, since it features prominently on the international agenda, whereas it presents major problems in the daily reality of most countries. Specific categories of victims had to be addressed separately, since differential victimology is rapidly gaining prominence, which has been keenly recognized by international lawmakers. Finally, the ICC was selected as the main illustration of the problems presented by mass victimization. What matters is that the selection of issues has not been random. Choices were guided by their significance to draw inferences and conclusions that are also relevant for policy areas that could not be touched upon in this article.

The main findings will be presented as briefly as possible. The first one concerns the choice of legal instruments by international policy makers. A general trend appears to be that bodies responsible for setting minimum standards have an inclination to progressively use more powerful legal instruments: from Recommendation and Declaration to Conventions; in Europe: from a Framework Decision to a Directive; everywhere the same pattern. It has never been proven that this kind of legal escalation produces the desired results. As an extension of this observation it can be noted that with each progressive step the substantive requirements in the 'minimum' standards are being raised. If national states do not comply with international standards, the standards are being raised. One might wonder if it would not make more sense to invest energy in achieving compliance with the initial standards and norms.

The second observation that follows from the preceding sections is about remedies. A recurrent problem that has been encountered is that victims' rights, even when they are included in domestic legislation, are violated on a large scale.<sup>62</sup> When considering a range of options to improve this situation, very little attention has been paid to the issue of remedies. Are sanctions in place when victims' rights are not respected? In most countries these are non-existent. If offenders' rights are neglected, there are all kinds of remedies (the exclusionary rule and many more). However, the basic rights of victims are violated, the criminal justice system does not offer any kind of systematic redress. Repairing this strange imbalance could be an avenue towards increased compliance with the victims' rights on which we have collectively agreed.

This edition of the journal has a separate article on restorative justice. That is why the topic has not been featured in the above sections. From the point of view of international policy making, though, some words on restorative justice are appropriate. In what can be called the 'first generation' of international instruments on restorative justice, it was more or less assumed – taken for granted – that mediation and other forms of restorative justice are in the best interests of crime victims.<sup>63</sup> By contrast, the most recent documents dealing with this are more realistic and more advanced from the point of view of victimological evidence.<sup>64</sup> It can only be considered as promotion of the integrity of restorative justice practices when now the EU Directive has introduced novel provisions such as 'the restorative justice services are used only if they are in the interest of the victim . . .'; and 'Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing any restorative justice services'.

In the introduction, it was mentioned that in some parts of the criminal justice system there is some ingrained resistance to change on behalf of victims of crime. After reviewing the developments in the preceding sections, the fact must be faced that in some circles the opposition has even increased. Judges feel that some of the most recent standards do compromise the right to a fair trial by offenders. Even some academics argue in public debate that the phrase 'victims' rights' is used lightly; they would prefer the expression of rights of 'presumed victims'.<sup>65</sup> We ought to be concerned about this development, try to understand it and aim to stop it. The problem is – among others – that some of the measures that have recently been introduced with an appeal to victims' interests are indeed unfair and 'over the top'. Examples are the frequent introduction of mandatory sentences; abolishing statutes of limitation (even retrospectively); and abolishing the principle of double jeopardy. That is asking for trouble. That is asking for 'victim fatigue'.

Those were the days. The early and mid-1980s, when reform of the criminal justice system on behalf of crime victims was relatively easy to achieve and when these reforms were content-wise relatively moderate. The times they have changed. New opportunities lie ahead of us, but we are also faced with serious threats. We – the international community of victimologists – must beware of excessive demands and not allow overzealous politicians or naïve victims' advocates to become responsible for a backlash.

No matter the burdens to overcome and the pitfalls to avoid, the overriding and indisputable final observation has to be that during the past three decades or so we have made tremendous progress in making this world a less unpleasant place for victims of crime.

## Notes

1. A/res/40/34 of 29 November 1985. The history of the Declaration is further documented by Kirchhoff (2009).
2. Adopted by the Committee of Ministers on 28 June 1985. See Reeves (2009).



3. An example is India (Chockalingam, 2005).
4. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, respectively.
5. It has to be noted in passing that the right to protection for privacy and protection of physical safety are almost without exception mentioned in the same article or provision. In more than one sense that is surprising, because both rights represent completely different interests and pose completely different demands on the governments responsible for observing these standards.
6. It can be observed that the final two rights (social assistance and state compensation) are strictly speaking not rights that address the way the criminal justice system ought to be operated.
7. Reading this closely and literally, it is virtually shameless to see what little protection is offered here ('considering . . . proscribing abuse of power' – sic).
8. The scope of this article is limited to crime. This obtains even when the role of the ICC and ad hoc Tribunals is discussed, since their jurisdiction on mass victimization is limited to serious forms of international crime. See the Rome Statute, discussed in the discussed below.
9. For the sake of clarity, it has to be explained that in the present contribution no systematic distinction will be made between international law and policy rules. Both are seen as two parts of international standard setting and one set of provisions is probably useless without the other. This will turn out to be a recurrent theme in the following sections of this article.
10. Of course there are many more obstacles involved, but the two factors mentioned in the text are indisputable.
11. The wheels of international diplomacy had already started to turn at a much more relaxed pace.
12. More on this in Groenhuijsen (1999).
13. This train of events confirms the point that it is impossible to make a firm distinction between formal rules (even when they are included in non-binding instruments such as the Declaration) and 'policy rules', which in many countries are not even recognized as genuine legal rules. In every system of law, there needs to be some delicate interplay between the two sets of measures.
14. The research-based justification for this general conclusion cannot be derived from subsequent UN initiated follow-up projects. The evidence rests on compliance studies on regional legal instruments having similar victims' rights to the ones in the Declaration. An example will be elaborated in the next section, on the European Framework Decision in Victims' Rights.
15. [www.tilburguniversity.edu/upload/f482b949-fb05-4fae-8632-0263d903d6dc\\_convention.pdf](http://www.tilburguniversity.edu/upload/f482b949-fb05-4fae-8632-0263d903d6dc_convention.pdf); and [www.worldsocietyofvictimology.org/publications/Draft%20Convention.pdf](http://www.worldsocietyofvictimology.org/publications/Draft%20Convention.pdf). An updated and improved draft was published by Dussich and Mundy (2009), and also in Groenhuijsen and Letschert (2012).
16. Since 1985, we have learned much more about different needs of different groups of victims.
17. A concept that was hardly known in 1985, but that turned out to be enormously important for shaping adequate victims policies; see Farrell (1992, 1995).
18. Violation of information rights is the single most common complaint when interviewing victims (Brienen and Hoegen, 2000).
19. In an exposition on the development of international policy in relation to crime victims it should not go unnoticed that – except for the final one – all of these improvements vis-à-vis the Declaration can also be traced in the Recommendation Rec(2006)8 on Assistance to Crime Victims, adopted by the Council of Europe on 24 June 2006.
20. Reflected in its name: European Economic Union.
21. Treaty on the European Union, 7 February 1992, consolidated version OJ 2002, C 325/1 (Klip, 2012a, 2012b).
22. For example, Kaunert (2005).

23. Adopted on 15 March 2001, 2001/220/JHA.
24. Article 3: ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.
25. Article 4: ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced is released, a decision may be taken to notify the victim if necessary. (It cannot be overlooked that this is a sensitive matter: the qualifiers in this provision allow the Member States plenty of discretion in transposing this obligation).
26. Article 8: '... ensure that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide that court premises have special waiting areas for victims'.
27. Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Brussels 16 February 2004, COM(2004)54 final/2.
28. Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), Brussels 20 April 2009, COM(2009) 166 final.
29. Examples are provided by Groenhuijsen and Pemberton (2009).
30. European Commission, Commission Staff Working Paper Impact Assessment, Brussels 18 May 2011, SEC(2011) 580 final.
31. Comment: this is a surprising observation; the language of the Framework Decision is at least as precise as any other international protocol on victims' rights.
32. Comment: this is a clearly unconvincing assertion. If there are no real obligations, how can the Commission reach the conclusion that the Member States have failed to comply with them?
33. Comment: infringement proceedings are obviously not a solution if the Commission finds that *all of the Member States* are in violation of their obligations. However, this is not the right place to discuss legal technicalities.
34. This belief was fundamentally challenged by Groenhuijsen and Pemberton (2009), arguing that soft law is not necessarily less influential than hard law.
35. Finch (1974) with many additional references. This theory was fundamentally rejected by Hart (1958). There is particular reason to be sceptical of this view within the EU. Research in political science has revealed the tendency of a number of Member States to opt for 'literary transposal', rather than actual compliance with EU legislation, amounting to a 'World of Dead Letters'. See Falkner et al. (2005) and Pemberton and Groenhuijsen (2012).
36. Converting Framework Decisions into Directives was made possible by the Treaty of Lisbon (the Treaty on the European Union and the Treaty on the Functioning of the European Union), entering into force on 1 December 2009.
37. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.
38. This is followed by a reference to articles 23 and 24, in which further details of this individual assessment are prescribed.
39. The only international – regional – instrument preceding the Declaration in this respect is the European Convention on the Compensation of Victims of Violent Crimes, by the Council of Europe, Strasbourg 24 XI 1983. Note that this is a Convention, which can be ratified by Member States on a voluntary basis.
40. Council Directive 2004/80/EC of 29 April 2004 relating to Compensation to Crime Victims.
41. Recitals 7 and 12 respectively to the Directive.



42. Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Directive 2004/80/EC relating to compensation of crime victims, Brussels 20 April 2009, COM(2009)170 final.
43. It is astonishing to see that reliable data always seem to be absent some years after the introduction of important new legal instruments.
44. On theoretical underpinnings and the Dutch situation: Mulder (2013); on an international and comparative level: Groenhuijsen (2001), Goodey (2005) and Miers (2007).
45. An important and consistent research finding is that victims have a preference for receiving payment from the offender, rather than from the State or other sources (Okimoto and Wenzel, 2008; Shapland et al., 1985).
46. Common examples mentioned in academic literature are previous contacts with the criminal justice system, personality traits, etc.
47. All of this is in article 22 of the Directive.
48. With special provisions for victims in article 24 (protection of witnesses) and article 25 (assistance to and protection of victims).
49. Adopted by General Assembly Resolution 55/25 of 15 November 2000, with many measures to protect and assist victims of trafficking in persons (articles 6 ff).
50. More about this in the next section.
51. General Assembly resolution 44/25, annex.
52. Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. These Basic Principles are usually referred to as the Van Boven–Bassiouni principles, since these two eminent scholars produced the first draft of the Principles.
53. Warsaw, 16 May 2005.
54. Istanbul, 11 May 2011. All the documents mentioned are collated by Groenhuijsen and Letschert (2012).
55. A concrete case where this could be problematic is the special arrangements on behalf of victims of terrorism; see Albrecht and Kilchling (2007) and Letschert et al. (2010).
56. Some examples are Nardin (2011) and Lesaffer (2012).
57. Rome Statute of the ICC; text circulated as document A/CONF.183/9 of 17 July 1998. The Statute entered into force on 1 July 2002 and was complemented by Rules of Procedure and Evidence.
58. The classical source is still Damaska (1986).
59. Attention to victims was completely absent during the trials after WWII (Neurenburg and Tokyo) and was very limited in the special ad hoc Tribunals, such as the ICTY and ICTR. There is no room here to go into the details of the relevant provisions. The literature on victims in the framework of the ICC is overabundant; suffice it to mention Ferstman et al. (2009).
60. For legal details of both problems – the application process and mandatory representation – see de Brouwer and Groenhuijsen (2009).
61. Out of many: McGonigle Leyh (2011). RPE stands for Rules of Procedure and Evidence.
62. Just one example to refresh our memories: state obligations to provide information to victims are violated in a *majority* of all cases (see the second section of this article).
63. The UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 2002/12; the Council of Europe Recommendation R(99)19 concerning Mediation in Penal Matters (15 September 1999).
64. Pemberton et al. (2007, 2008) and Sherman and Strang (2007).
65. Schünemann (2011), extolling an obviously erroneous perception of the presumption of innocence.

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